IN THE

Supreme Court of the United States.

October Term, 1904.

A. L. SMALLEY and F. McLELLAN,
Plaintiffs in Error,
vs.
GEORGE F. LAUGENOUR and JANE LAUGENOUR,
Defendants in Error.
No. 97.

In Error to the Supreme Court of the State of Washington.

BRIEF FOR PLAINTIFFS IN ERROR.

(Submitted under the 20th rule.)

STATEMENT.

This is a suit in ejectment brought by the plaintiffs in error against the defendants in error to recover possession of certain real property. Plaintiffs in error assert title under the lien of a judgment gotten by plaintiffs in error and another, against George F. Laugenour, one of the defendants in error, and the resulting sale of said land upon execution to satisfy said lien, the land being bought in by the plaintiffs in error at such sale (Trans., pp. 10, 11). The said judgment was entered on March 16th, 1895, from which date the lien accrued (Findings 3, 11, trans., pp. 10, 11, 3-5). Upon April

12th, 1899, an execution was issued out of the state court upon the said property and levied thereon by the sheriff upon said last named date, and thereafter, to-wit: on May 13, 1899, the said land was sold by the sheriff under said execution so levied, and was bought in by the plaintiffs in error. On May 27th, 1899, the state court duly made its order confirming said sale and declaring it valid (Trans., p. 11).

The defense, material here, set up by defendants in error, was that on May 10, 1899, over four years after the accrual of the said lien and about a month after the levy of the execution on the property, defendant George F. Laugenour filed a petition in bankruptcy, and thereafter, to-wit: on the 11th day of May, 1899, was adjudged a bankrupt. That, on August 9, 1899, the United States District Court, as a court of bankruptcy, discharged said George F. Laugenour as a bankrupt and that, on the 12th day of August, 1899, the said court made an order, in the bankruptcy proceeding, setting aside the said property involved in the ejectment suit as exempt and awarding it to the said bankrupt (Trans., pp. 6, 12).

The trial court awarded the land, in the ejectment proceeding, to the plaintiffs in error, and on appeal the state supreme court reversed the court below and awarded the land to the defendants in error (Trans., pp. 23-29). The decision of the state supreme court rested entirely upon a construction of the act of Congress of July 1, 1898 (30 *U. S. Stats. at Large*, 544), to the effect that the bankruptcy court had jurisdiction of the property, and had passed upon the re-

spective rights of the plaintiffs and defendants in error, and had decided against the plaintiffs in error, and that said decision was *res adjudicata*. The state supreme court said:

"Passing to the merits of the controversy it is at once "obvious that the correctness of the judgment of the "trial court must depend upon the effect that is given "to the order of the bankruptcy court setting apart to "the bankrupt the property in question as property "exempt from the claims of his creditors." (Opinion state supreme court, trans., p. 25.)

ASSIGNMENT OF ERRORS.

(**Trans., pp. 37-38.**)

I.

The court erred in holding that under the provisions of the act of Congress entitled "An act to establish a uniform system of bankruptcy throughout the United States" approved July 1, 1898 (30 *U. S. Stats. at Large*, p. 544), it was not necessary for the trustee to "set apart the bankrupt's exemptions" as a pre-requisite to the making of a valid order by the bankruptcy court determining the claims of the bankrupt to his exemptions under said act of Congress.

II.

The court erred in holding that the court of bankruptcy, under said act of Congress, had power to make a valid order setting apart as exempt certain of the bankrupt's property without the pre-requisite of the appointment of a trustee under said act.

III.

The court erred in holding that the court of bankruptcy had jurisdiction under the said act of Congress to adjudicate in a summary manner as to the validity or existence of a lien claimed to have accrued upon the real property of the bankrupt more than four months prior to the filing of the petition in bankruptcy under the said act of Congress.

IV.

The court erred in holding that after the process of the state court had attached to the real property of the bankrupt and it was in course of being sold under such process, the order of the bankruptcy court under said act of Congress setting aside such property as exempt, operated without any stay or injunction being imposed upon the action of the state court or its process or the sale in progress, to interfere with the action of the state court or its process in that regard, and invalidated the sale of said property had under such process of the state court.

V.

The court erred in holding that the order of the bankruptcy court under the said act of Congress setting apart as exempt the said real property to the bankrupt, made subsequent to the sale under the process of the state court of the said property, so subsequently set apart, related back to the date of the filing of the petition in bankruptcy so as to take effect prior to said sale and invalidate the same.

VI.

The court erred in holding that the said order by the bankruptcy court under the said act of Congress setting aside as exempt the said real property to the bankrupt, adjudicated, as between the bankrupt and the said A. L.

Smalley and F. McLellan, the fact of the exempt character of the said property so as to make the sale under the process of the state court of said property upon a lien of a judgment thereon, said sale occurring prior to said order by the bankruptcy court, invalid and void.

VII.

The court erred in holding that the said order of the bankruptcy court, under the said act of Congress setting apart as exempt the said real property to the bankrupt was *res adjudicata* as between the said bankrupt and the said A. L. Smalley and F. McLellan as to exempt character of the said real property, with regard to the lien of the judgment had thereon by the said A. L. Smalley and the said F. McLellan.

VIII.

The court erred in holding that at the time of the making of the said order by the bankruptcy court setting aside the said real property as exempt the said real property was within the jurisdiction of the said bankruptcy court.

IX.

The court erred in giving judgment against the said A. L. Smalley and F. McLellan.

X.

The court erred in holding that the said respondents A. L. Smalley and F. McLellan did not have the right under and by virtue of the said act of Congress, to-wit: "An act to establish a uniform system of bankruptcy throughout the United States" approved July 1, 1898 (30 *U. S. Stats. at Large*, p. 544), to have the validity or invalidity of the sale of the bankrupt's real property under the process of the state court, adjudicated in the

state court uninfluenced by the order of the bankruptcy court setting said property aside as exempt.

XI.

The court erred in holding that the said respondents A. L. Smalley and F. McLellan did not have the right under and by virtue of the said act of Congress known as the bankruptcy act, to-wit: the act entitled "An act to establish a uniform system of bankruptcy throughout the United States," approved July 1, 1898 (30 *U. S. Stats. at Large*, p. 544), to have the lien claimed and had by them upon the bankrupt's real property before four months prior to the filing of the petition in bankruptcy, adjudicated by the state court together with every fact tending to establish the validity or invalidity of said lien.

BRIEF.

THE MERITS.

I.

The entry of the judgment gave to the plaintiffs in error a lien upon the land in controversy.

"The real estate of any judgment debtor and such as "he may acquire, shall be held and bound to satisfy any "judgment of the district or circuit court of the United "States, if rendered in this state, or of the superior or "supreme court, or any judgment of a justice of the "peace for the period of five years from the day on "which said judgment was rendered, and such judgment "shall be a lien thereupon to commence as follows: "Judgments of the superior court of the county in which

"real estate of the judgment debtor is situated, from the "date of the entry thereof; judgments of the district or "circuit courts of the United States, if rendered in this "state; judgments of the supreme court; judgments of "the superior court of any county other than the county "in which said judgment was rendered, and judgments "of a justice of the peace, from the time of the filing "and indexing of a duly certified transcript or abstract "of such judgments, as provided by this chapter, with "the county clerk of the county in which said real "estate is situated."

2 *Ballinger's Annotated Codes & Statutes of Washington*, § 5132.

The lien attached at the time of entry of the judgment, not at the time of the levy of the execution.

Mayer v. Morgan, 26 Wash., 71.

The jurisdiction of the bankruptcy courts has been always strictly construed with the view of restricting interference with the jurisdiction of the state courts.

Bardes v. First National Bank, 178 U. S., 524.

If the lien had been a mortgage, or there had been an interest claimed in the land under a disputed deed, it can hardly be said that the summary order of the court, declaring the property exempt, adjudicated such conflicting adverse claims therein. Nor from the nature of the case does it logically follow that the court intended to adjudicate any interest claimed in the land. The

action of the court was an "order in said bankruptcy proceedings," not a *judgment* in a plenary suit (Finding 16, trans., p. 12). It is entirely consistent with the terms of the order that any lien actually existing prior to the date on which the order was made, was left unaffected by such order. As to all debts sought to be enforced against the bankrupt in the bankruptcy proceedings, and as between the trustee and bankrupt, the order can properly operate (30 *U. S. Stats. at Large*, 565, § 70). As to all interests in the land claimed by persons not taking advantage of the bankruptcy proceedings, it cannot properly operate. All creditors asking protection from the bankruptcy court are protected; they lose nothing by the bankrupt taking for his exemptions a mortgaged piece of land, or a piece of land a part of which a third person owns. If the bankrupt desires to take for his exemptions a piece of land so burdened, it is his privilege. The exempt character of the property, so far as this interest born of the lien and the title under the sale was concerned, was left to be determined by the state court. The mere act of the court in setting the property aside as exempt did not affect the interest had in the land by plaintiffs in error at the filing of the petition in bankruptcy.

Lockwood v. Exchange Bank, 190 U. S., 294.
White v. Thompson, 119 Fed., 868.
In re Hunt, Fed. Cas., 6883.
In re Little, 110 Fed., 621.
In re Gibbs, 109 Fed., 627; s. c., 103 Fed., 782.
In re Dunavant, 96 Fed., 542.

Plaintiffs in error lost no right by failing to prove their debt.

Yeatman v. New Orleans Sav. Inst., 95 U. S., 764.

If the order awarding the exemptions is *res adjudicata* as to the rights of plaintiffs in error, it is because the bankruptcy court took jurisdiction of such rights and passed upon them. No cause of action was set up and no special relief was asked against plaintiffs in error. They were merely notified to present their claims (Findings 5, 6, trans., p. 6). The bankruptcy court did not have jurisdiction, in a summary proceeding, of the adverse interest in the property had by plaintiffs in error. Their adverse rights in the property could be extinguished only in a plenary suit.

"So far as this view rested on the contention that, as "Comingor was joined with the bankrupts in the peti- "tion for adjudication, he therefore continued to be sub- "ject to the orders of the court without other process, we "agree with the circuit court of appeals that it cannot "be sustained. As we understand the record, the peti- "tion in bankruptcy set up no cause of action and prayed "no special relief against Comingor, and he was appar- "ently made a defendant because adjudication would put "an end to further action by him as assignee. Clearly, as "the circuit court of appeals points out, it would be in- "admissible to permit creditors to deprive an assignee of "his right to have his claims adjudicated by the proper "court and in the customary mode of proceeding, by the "device of making him a party to the petition for an ad-

"judication and so attempting to bring him into the case "for all purposes. Nor in this matter was any petition "by the trustee, or by any other person, filed against "Comingor to recover these sums, and the orders were "entered by the referee on the record as it stood, so that "there was no pretense whatever of a plenary suit in "that court, in form or in substance.

"The proceeding was purely summary. The de- "termination of the merits on the facts was not open to "revision by appeal or writ of error under the bankrupt "law. If Comingor had been entitled to a trial by jury, "he could not have obtained it as of right. The collection "of the amounts found due would be enforceable, not by "execution, but by commitment.

"'We think that it could not have been the intention "'of Congress thus to deprive parties claiming property "'of which they were in possession of the usual pro- "'cesses of the law in defense of their rights.' Marshal "v. Knox, 16 Wall., 556, 21 L. ed. 484; Smith v. Mason, "14 Wall., 419, 20 L. ed. 748."

Louisville Trust Co. v. Comingor, 184 U. S., 18.
Jaquith v. Rowley, 188 U. S., 620.
Pickens v. Roy, 187 U. S., 177.
Marshall v. Knox, 16 Wall., 551.
In re Buntrock Clothing Co., 92 Fed., 886.

II.

The lien accrued March 16, 1895, by the entry of judgment (2 *Ballinger's Annotated Codes & Statutes*,

§ 5132; findings 3, 11, trans., pp. 10, 11, 3-5). The petition in bankruptcy was not filed until May 10, 1899 (Finding of fact 12, trans., pp. 12, 6). The order discharging the bankrupt was not made until August 9, 1899, and the order setting aside the land as exempt and awarding it to the bankrupt was not made until August 12, 1899 (Findings of fact 15, 16, trans., pp. 12, 6).

On April 12, 1899, nearly a month prior to the filing of the petition in bankruptcy and four months prior to the award of the land to the bankrupt, the land had been taken possession of by the state court, having unquestioned jurisdiction, for the purpose of satisfying the lien of plaintiffs in error thereon, under a writ of execution issued out of the state court duly levied upon said land at that date (Finding of fact 4, trans., p. 11).

"It is true that an officer seizing property under pro-
"cess acts as the agent of the court out of which the
"process issued, and his possession becomes the pos-
"session of the court."

1 *Freeman on Execution* (2d ed.), § 135.
Frazier v. Southern Loan & Trust Co., 99 U. S., 707.

This property was still in the possession and jurisdiction of the state court up to May 13, 1899, when it was sold to plaintiffs in error by the sheriff in obedience to the state court's process (Finding of fact 4, trans., p. 11). On May 27, 1899, the state court continued in the exercise of its jurisdiction and made an order con-

firming the sale and declaring it valid (Finding of fact 5, trans., p. 11). Either the state court had jurisdiction to sell and the sale was, therefore, valid and conclusive, or the bringing of the bankruptcy proceeding, or the adjudication of bankruptcy, *ipso facto* took its jurisdiction away and vested jurisdiction of the property and of the lien in the bankruptcy court.

The language of this court in *Eyster v. Gaff*, 91 U. S., 521, is very apposite here.

"It is a mistake to suppose that the Bankrupt Law "avoids of its own force all judicial proceedings in the "state or other courts the instant one of the parties is "adjudged a bankrupt. There is nothing in the act which "sanctions such a proposition. The court in the case be-"fore us had acquired jurisdiction of the parties and of "the subject matter of the suit. It was competent to ad-"minister full justice and was proceeding according to "the law which governed such a suit to do so. It could "not take judicial notice of the proceedings in bank-"ruptcy in another court however seriously they might "have affected the rights of the parties to the suit "already pending.

"It was the duty of that court to proceed to a decree as "between the parties before it, until by some proper "pleadings in the case it was informed of the changed "relations of any of those parties to the subject matter "of the suit. Having such jurisdiction and performing "its duty as the case stood in that court, we are at a loss "to see how its decrees can be treated as void. It is al-

"most certain, that if at any stage of the proceedings "before sale or final confirmation, the assignee had in- "tervened, he would have been heard to assert any right "he had, or set up any defense to the suit."

In *Marshall v. Knox*, 16 Wall., 551, this court said:

"Such case is similar to that of an execution, in refer- "ence to which it has been held that, where a levy is "made before the commencement of proceedings in "bankruptcy, the possession of the officer cannot be "disturbed by the assignee."

In re Easley, 93 Fed., 419.

The property having been in the possession of the state court and under its jurisdiction when the petition in bankruptcy was filed, and that jurisdiction having been exercised upon it prior to the order of exemption and award by the bankruptcy court, such subsequent action by the bankruptcy court could neither devest the state court of its jurisdiction, nor invalidate and nullify the state court's action previously had under such jurisdiction.

"The state courts had jurisdiction over the parties "and the subject matter and possession of the property "and it is well settled that where property is in the actual "possession of the court this draws to it the right to de- "cide upon conflicting claims to its ultimate possession "and control."

Metcalf Bros. & Co. v. Barker, 187 U. S., 165.

Pickens v. Roy, 187 U. S., 177.
Peck v. Jenness, 7 How., 612.
Marshall v. Knox, 16 Wall., 551.
Norton v. Boyd, 3 How., 426.
Yeatman v. Institution, 95 U. S., 764.
In re Wells, 114 Fed., 222.
In re Buntrock Clothing Co., 92 Fed., 886.
Frazier v. Southern Loan & Trust Co., 99 Fed., 707.
In re English, 122 Fed., 113.
White v. Thompson, 119 Fed., 868.
In re Hunt, Fed. Cas., 6883.
Collier on Bankruptcy, pp. 20, 21.

The decision of the state court in the case at bar rested on the theory that the order of the bankruptcy court, awarding the property to the bankrupt, related back to the filing of the petition and antedated the sale, and therefore the sale was void. There is no word anywhere in the bankruptcy act of 1898, giving such relation to such an order, and this effect is arbitrarily created without statutory authority and, it is submitted, does not exist. But though the order did relate back so as to antedate the sale, in order to nullify the state court's action, it had to devest the state court of its jurisdiction as of the date of the filing of the petition, and the bankruptcy court had to adjudicate the adverse interest of plaintiffs in error in a summary proceeding, through jurisdiction had from the time of filing the petition, and the state court so held:

"It must be borne in mind that the order of the bank-
"ruptcy court related back to the time of the filing of
"the petition in bankruptcy, and is a judgment of that
"court that the property was exempt at that time, and
"is, in its effect, a judgment that the respondents' judg-
"ment was not a lien on it." (Opinion, trans., p. 28.)

This, as we think we have very clearly shown above, this court has declared the bankruptcy act does not permit.

The property might have been made a homestead only a day before the 12th day of August, 1899, when the order of exemption was made, and not have been such when it was sold by the state court (2 *Ballinger's Annotated Codes & Statutes*,§§ 5214-5246, see appendix), and the bankrupt had full opportunity to show what in fact was the exact condition of the property on the day of its sale, by proper action in the state court, if he desired to protect it from the lien, then in process of foreclosure; and the plaintiff in error had the right to protect his lien, by litigating in a plenary suit in the state court the question whether on the day of sale the property was in fact a homestead or exempt.

THE FEDERAL QUESTION.

The lien grew out of a legal proceeding more than four months prior to the bankruptcy proceeding, was not avoided by the act, and, very clearly, by sections 67f and 67d of the act there is intended and provided protection for it and the title acquired under it, and the

act gives immunity to its owners from its destruction by or through the operation of the act. This right is had by plaintiffs in error under and by virtue of the act. All the foregoing cases are authority supporting this proposition.

Metcalf Brothers & Co. v. Barker, 187 U. S., 165.
In re Kirby Dennis Co., 95 Fed., 119.
In re Laird, 109 Fed., 550.

This right to the protection of their lien under this Federal statute, this immunity from its operation granted by it to this lien, was denied and taken away from plaintiffs in error by the ruling of the state supreme court.

But it is insisted by defendants in error that no Federal question is involved in the case at bar, and, therefore, this court is without jurisdiction, it being contended that the only right claimed under the bankruptcy act was that claimed by the defendants in error, to-wit: the protection of Laugenour's discharge in bankruptcy and of the order of the bankruptcy court setting aside the property as exempt, and that this claim of right was decided in favor of the parties asserting it (Third affirmative defense of the answer, trans., pp. 5, 6).

It is quite true that the defendants in error have asserted very distinctly in this litigation the right or immunity which, as a general rule, is found in the discharge in bankruptcy and in the order setting aside the bankrupt's exemptions. It is equally true, however, that the bankruptcy act recognizes and provides ex-

ceptions to the operation of such discharge and such award of exemptions, which exceptions give positive protection to those coming within them from the operation of such discharge and such award. The plaintiffs in error are clearly within one of such exceptions and are entitled to the immunity thus given them by this Federal statute. Liens accruing prior to four months preceding the filing of the petition in bankruptcy constitute an exception to the operation of the discharge and of the award of exemptions, and are immune from their operation and this immunity or right was definitely and emphatically asserted by the pleadings on behalf of plaintiffs in error, was debated in the courts, was forced on the attention of the state supreme court, and was squarely met and decided by it adversely to the plaintiffs in error.

The defendants in error having asserted as their defense the general rule relative to the protection lying in the discharge and the award of exemptions under the act, the plaintiffs in error in their reply to such claim, clearly and distinctly asserted on their behalf an exception to such general rule, also lying within the act, and claimed the immunity of such exception as their defense to the right asserted under the general rule by the defendants in error. Paragraph three of the reply of plaintiffs in error is as follows:

"3. That on the date of the rendition of said judg-
"ment, to-wit: On the 16th day of March, 1895, said
"George F. Laugenour and Jane Laugenour were the

"owners in fee simple of said real estate and the said "judgment, immediately after its rendition and filing, "became and constituted under the laws of this state, a "lien thereon; and said lien which culminated in the "aforesaid sale of real estate to plaintiffs was obtained "and created pursuant to said suit, and more than four "months prior to the filing of the alleged petition in "bankruptcy mentioned in par. 4 of page 4 of defend-"ant's answer." (Trans., p. 9.)

This pleading standing by itself, points with unerring accuracy to the assertion of an immunity under the bankruptcy act and, read together with the third affirmative defense of the answer of defendants in error (Trans., pp. 5, 6), points with equal certainty to an exception to the general rule pleaded by defendants in error, and to a claim of immunity under such exception. The pleadings standing by themselves are thus fully sufficient to clearly show the assertion of an immunity or right, claimed under the bankruptcy act, but reference to the opinion of the state supreme court discloses that this asserted right on the part of plaintiffs in error was forced upon the attention of that court, was debated before it and was squarely decided by it against plaintiffs in error (Trans., pp. 23-29). Plaintiffs in error are thus brought, so far as the existence of a Federal question is concerned, completely within the rule announced by this court, and a Federal question is clearly shown.

Palmer v. Hussey, 119 U. S., 96.
McCormick v. Market Nat. Bank, 165 U. S., 538.

In *McCormick v. Market National Bank, supra*, in condemning and refusing to follow a prior decision in accord with the contention made by defendants in error in the case at bar, the court said:

"But the court there failed to notice that the decision, "while in favor of the right or immunity, set up by the "defendant, of a discharge under the bankruptcy act, "was also against the right or immunity, set up by the "plaintiff under the clause excepting fiduciary debts "from the effect of that discharge."

It is urged on behalf of defendants in error, that this court cannot look to the opinion of the state supreme court to determine the point decided by that court, in order to determine whether a Federal question is presented. We think we have shown above that the Federal question stands out clear and strong on the face of the pleadings alone, but that the opinion of the state court may be resorted to by this court, to determine the exact point decided, has been long established in this court, and the authorities cited by defendants in error have been superseded by later decisions. Both the constitution of the state of Washington (article 4, section 2, see appendix) as well as the statutes of the state (2 *Ballinger's Annotated Codes & Statutes*, section 4654, see appendix) require all the decisions of the supreme court of the state to be in writing, and the opinion in the case at bar is a part of the record (Trans., pp. 23-29).

Kreiger v. Shelby R. R. Co., 125 U. S., 39.
Colum. W. P. Co. v. Columbia etc. Co., 172 U. S., 475.

If the right or immunity was specially set up or claimed in such manner as to bring it to the attention of the state court, it is sufficient. The form in which the question is raised is not material.

> *Greenbay & M. Canal Company v. Patten Paper Co.*, 172 U. S., 58.

If not raised until the case is in the state supreme court it is still sufficient; and, though the pleadings are obscure, if it clearly appears that the point was raised and decided in the highest state court, it is enough.

> *Sully v. American National Bank*, 178, U. S., 289.
> *Rothschild v. Knight*, 184 U. S., 334.
> *Bridge Props. v. Hoboken L. & I. Co.*, 68 U. S., 116.

It is not necessary to specify the law; the court takes judicial knowledge of the law.

> *Bridge Proprietors v. Hoboken L. & I. Co.*, 68 U. S., 116.

In their brief on the motion to dismiss or affirm, the defendants in error rested their case on two propositions, as being decided by the supreme court of Washington, and as being conclusive. We quote:

"1. That the adjudication of exemption made by the "Federal court was made with jurisdiction and was *res* "*adjudicata*. This was a decision *in favor* of Laugenour "granting a claim made by him to a title, right, privilege "or immunity under a previous adjudication of a federal "court and cannot now be reviewed by this court."

This proposition we have discussed.

"2. That the real estate being exempt an execution "sale thereof was ineffectual to pass title to the pur- "chaser. This question was decided solely under the "laws of the state of Washington and in no way involved "a Federal statute, the jurisdiction of the Federal court "or a Federal question, and cannot be reviewed by this "court."

Before the state law, to the effect that exempt property could not be sold under execution, could be applied by the state supreme court, that court had to make the property exempt, as to the lien and sale, by the construction of the bankruptcy act and by the denial of the immunity had thereunder by plaintiffs in error, such exemption and denial being accomplished by the holding of the state supreme court that the order of the bankruptcy court, setting the property aside as exempt, was made with jurisdiction to decide and did decide adversely and conclusively, as to the plaintiffs in error, the fact that the property was a valid homestead at the date of filing the petition and on the day of sale, that there was no lien, and that the sale was invalid. Thus the state court held that ultimately from the bankruptcy act came the destruction of the lien. The state supreme court said:

"If, therefore, the property in question was exempt "from execution at the time the sale was made under "the execution issued on the respondent's judgment,

"the respondents acquired no title thereto by their pur-
"chase at the execution sale, and, consequently, have
"no title on which they can maintain the present action.
"Now the appellants were at liberty to establish this
"fact in one or both of two ways, they could plead and
'prove the facts showing the property to have been
"exempt from execution at the time of the sale, thus
"making the question directly an issue in the state
"court, *or they could plead and prove that the question*
"*had been once adjudicated between the parties in a court*
"*of competent jurisdiction having the parties and the sub-*
"*ject matter before it. The appellants chose the latter*
"*method.* They sought to show that the property was
"exempt by showing that a bankruptcy court having
"jurisdiction of the person and estate of the appellants
"in a proceeding in bankruptcy in which the respond-
"ents' judgment was provable had awarded the prop-
"erty to the appellants as properly exempt from the
"claims of his creditors. *As this order related back to*
"*the time of the institution of the bankruptcy proceedings,*
"it is *res judicata*, if it has the force of *res judicata* at
"all, that the property was exempt from sale at the
"time sale thereof was made, and, hence, an adjudication
"that the sale was void." (Trans., p. 26. See also p. 28.)

It is manifest that the question that the state supreme court decided, and which decided the case adversely to plaintiffs in error, was not one of state law, but was one involving a Federal statute, the jurisdiction of the Federal court and a Federal question.

The state supreme court should be reversed.

Respectfully submitted,

C. S. VOORHEES,
REESE H. VOORHEES,
H. A. P. MYERS,
W. T. WARREN,
Counsel for Plaintiffs in Error.

APPENDIX.

Section 5214. HOMESTEAD—OF WHAT CONSISTS.

The homestead consists of the dwelling house in which the claimant resides and the land on which the same is situated, selected as in this chapter provided.

Sec. 5217. EXEMPT FROM FORCED SALE.

The homestead is exempt from execution or forced sale, except as in this chapter provided.

Sec. 5243. MODE OF SELECTION.

In order to select a homestead the husband or other head of a family, or in case the husband has not made such selection, the wife must execute and acknowledge, in the same manner as a grant of real property is acknowledged, a declaration of homestead, and file the same for record.

Sec. 5244. DECLARATION, WHAT TO CONTAIN:

The declaration of homestead must contain,—

1. A statement showing that the person making it is the head of a family; or when the declaration is made by the wife, showing that her husband has not made such declaraton, and that she therefore makes the declaration for their joint benefit;

2. A statement that the person making it is residing on the premises or has purchased the same for a homestead and intends to reside thereon and claims them as a homestead;

3. A description of the premises;

4. An estimate of their actual cash value.

Sec. 5245. DECLARATION MUST BE RECORDED.

The declaration must be recorded in the office of the auditor of the county in which the land is situated.

Sec. 5246. TENURE BY WHICH HOMESTEAD IS HELD.

From and after the time the declaration is filed for record the premises therein described constitute a homestead. If the selection was made by a married person from the community property, the land, on the death of either of the spouses, vests in the survivor, subject to no other liability than such as exists or has been created under the provisions of this chapter; in other cases, upon the death of the person whose property was selected as a homestead, it shall go to his heirs or devisees, subject to the power of the superior court to assign the same for a limited period to the family of the decedent; but in no case shall it be held liable for the debts of the owner, except as provided in this chapter.

Sec. 4654. NECESSARY FOR QUORUM.

It shall require a majority of the justices of the supreme court to form a quorum and pronounce a decision. In the determination of causes, all decisions of the court shall be in writing, and the grounds of the decision shall be stated.

2 *Ballinger's Annotated Codes & Statutes of Washington.*

Sec. 2. SUPREME COURT.—The supreme court shall consist of five judges, a majority of whom shall be necessary to form a quorum and pronounce a decision.

The said court shall always be open for the transaction of business except on non-judicial days. In the determination of causes, all decisions of the court shall be given in writing, and the grounds of the decision shall be stated. The legislature may increase the number of judges of the supreme court from time to time, and may provide for separate departments of said court.

Art. IV, § 2, *Constitution of the State of Washington.*